

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JUDY L. SMITH,
Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner
of Social Security,
Defendant.

No. CV-11-0196-FVS

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT, IN PART, AND
REMANDING FOR ADDITIONAL
PROCEEDINGS

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument. (ECF No. 13, 16). Attorney Gary R. Penar represents plaintiff; Special Assistant United States Attorney Michael S. Howard represents the Commissioner of Social Security (defendant). After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** plaintiff's motion for summary judgment and remands the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed an application for disability insurance benefits (DIB) on December 18, 2008, alleging disability as of November 24, 2008, due to "back and knee pain" (Tr. 107, 132). The application was denied initially and on reconsideration.

Administrative Law Judge (ALJ) James W. Sherry held a hearing on December 22, 2009 (Tr. 34-72), and issued an unfavorable decision on February 1, 2010 (Tr. 12-22). The Appeals Council denied review on March 22, 2011 (Tr. 1-5). The ALJ's February

1 2010 decision became the final decision of the Commissioner, which
2 is appealable to the district court pursuant to 42 U.S.C. §
3 405(g). Plaintiff filed this action for judicial review on May
4 17, 2011. (ECF Nos. 1 & 4).

5 **STATEMENT OF FACTS**

6 The facts have been presented in the administrative hearing
7 transcript, the ALJ's decision, and the briefs of the parties.
8 They are only briefly summarized here.

9 Plaintiff was born on February 17, 1957 and was 51 years old
10 at the time of the alleged onset date. At the administrative
11 hearing, Plaintiff testified she was married, had no children, and
12 lived in a house with her husband (Tr. 39-40). Plaintiff
13 completed high school and attended two years of college and
14 special vocational training as a medical secretary (Tr. 40). She
15 indicated she last worked as a hostess with light cleaning duties
16 at an Applebee's Restaurant (Tr. 41). She also previously worked
17 at a Starbucks, at the Rockwood Clinic as an urgent care
18 receptionist, at Locating, Inc., locating underground utilities,
19 at the North Park Racquet Club as a yoga instructor, and at a YMCA
20 taking care of children. (Tr. 42-44). Plaintiff alleges she
21 stopped working in November of 2008 because of severe back pain
22 and leg pain (Tr. 41).

23 Plaintiff testified her back and knee pain cause her problems
24 with activities around the house and with dressing and showering
25 (Tr. 47-48). She stated she wears a back brace "all the time" and
26 only takes it off at night (Tr. 52). Plaintiff indicated she has
27 had surgery on both of her knees and that left knee replacement
28 surgery had been discussed (Tr. 52-55). She stated that while she

1 has had physical therapy for her knees, she has not had physical
2 therapy for her back because her doctor did not feel that it would
3 be helpful (Tr. 64-65).

4 SEQUENTIAL EVALUATION PROCESS

5 The Social Security Act (the Act) defines disability as the
6 "inability to engage in any substantial gainful activity by reason
7 of any medically determinable physical or mental impairment which
8 can be expected to result in death or which has lasted or can be
9 expected to last for a continuous period of not less than twelve
10 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
11 provides that a plaintiff shall be determined to be under a
12 disability only if any impairments are of such severity that a
13 plaintiff is not only unable to do previous work but cannot,
14 considering plaintiff's age, education and work experiences,
15 engage in any other substantial gainful work which exists in the
16 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
17 Thus, the definition of disability consists of both medical and
18 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
19 (9th Cir. 2001).

20 The Commissioner has established a five-step sequential
21 evaluation process for determining whether a person is disabled.
22 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
23 is engaged in substantial gainful activities. If so, benefits are
24 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If
25 not, the decision maker proceeds to step two, which determines
26 whether plaintiff has a medically severe impairment or combination
27 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
28 416.920(a)(4)(ii).

1 If plaintiff does not have a severe impairment or combination
2 of impairments, the disability claim is denied. If the impairment
3 is severe, the evaluation proceeds to the third step, which
4 compares plaintiff's impairment with a number of listed
5 impairments acknowledged by the Commissioner to be so severe as to
6 preclude substantial gainful activity. 20 C.F.R. §§
7 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
8 App. 1. If the impairment meets or equals one of the listed
9 impairments, plaintiff is conclusively presumed to be disabled.
10 If the impairment is not one conclusively presumed to be
11 disabling, the evaluation proceeds to the fourth step, which
12 determines whether the impairment prevents plaintiff from
13 performing work which was performed in the past. If a plaintiff
14 is able to perform previous work, that plaintiff is deemed not
15 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
16 this step, plaintiff's residual functional capacity (RFC) is
17 considered. If plaintiff cannot perform past relevant work, the
18 fifth and final step in the process determines whether plaintiff
19 is able to perform other work in the national economy in view of
20 plaintiff's residual functional capacity, age, education and past
21 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v);
22 *Bowen v. Yuckert*, 482 U.S. 137 (1987).

23 The initial burden of proof rests upon plaintiff to establish
24 a *prima facie* case of entitlement to disability benefits.
25 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
26 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
27 met once plaintiff establishes that a physical or mental
28 impairment prevents the performance of previous work. The burden

1 then shifts, at step five, to the Commissioner to show that (1)
2 plaintiff can perform other substantial gainful activity and (2) a
3 "significant number of jobs exist in the national economy" which
4 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
5 Cir. 1984).

6 STANDARD OF REVIEW

7 Congress has provided a limited scope of judicial review of a
8 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
9 the Commissioner's decision, made through an ALJ, when the
10 determination is not based on legal error and is supported by
11 substantial evidence. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th
12 Cir. 1999). "The [Commissioner's] determination that a plaintiff
13 is not disabled will be upheld if the findings of fact are
14 supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d
15 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial
16 evidence is more than a mere scintilla, *Sorenson v. Weinberger*,
17 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975), but less than a
18 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th
19 Cir. 1989). Substantial evidence "means such evidence as a
20 reasonable mind might accept as adequate to support a conclusion."
21 *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations
22 omitted). "[S]uch inferences and conclusions as the
23 [Commissioner] may reasonably draw from the evidence" will also be
24 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
25 On review, the Court considers the record as a whole, not just the
26 evidence supporting the decision of the Commissioner. *Weetman v.*
27 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
28 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

1 It is the role of the trier of fact, not this Court, to
2 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
3 evidence supports more than one rational interpretation, the Court
4 may not substitute its judgment for that of the Commissioner.
5 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
6 (9th Cir. 1984). Nevertheless, a decision supported by
7 substantial evidence will still be set aside if the proper legal
8 standards were not applied in weighing the evidence and making the
9 decision. *Browner v. Secretary of Health and Human Services*, 839
10 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
11 evidence to support the administrative findings, or if there is
12 conflicting evidence that will support a finding of either
13 disability or nondisability, the finding of the Commissioner is
14 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
15 1987).

16 **ALJ'S FINDINGS**

17 The ALJ determined that plaintiff meets the insured status
18 requirements of the Act through December 31, 2013 (Tr. 12). At
19 step one, the ALJ found plaintiff has not engaged in substantial
20 gainful activity since November 24, 2008, the alleged onset date
21 (Tr. 14). At step two, the ALJ found plaintiff had severe
22 impairments of "lumbar degenerative disc disease with L4-5 facet
23 hypertrophy and L2-3 foraminal stenosis status post fusion, and
24 left knee degenerative joint disease status post arthroscopy" (Tr.
25 14). The ALJ evaluated the medical evidence of record (Tr. 14-18)
26 and concluded, at step three, that plaintiff's impairments, alone
27 and in combination, did not meet or medically equal one of the
28 listed impairments in 20 C.F.R., Appendix 1, Subpart P,

1 Regulations No. 4 (Tr. 18). The ALJ then assessed plaintiff's RFC
2 and determined plaintiff could perform light work (lift and carry
3 20 pounds occasionally and 10 pound frequently, stand and/or walk
4 6 hours total in an 8-hour day, sit 6 hours total in an 8-hour
5 day, and push/pull unlimited within the lifting restriction);
6 could occasionally climb ramps or stairs but should never climb
7 ladders, ropes and scaffolds; could occasionally engage in
8 balancing, stooping, crouching, kneeling, or crawling; and should
9 avoid concentrated exposure to unprotected heights or the use of
10 moving machinery (Tr. 19).

11 With respect to plaintiff's credibility, the ALJ stated that
12 plaintiff's medically determinable impairments could reasonably be
13 expected to cause the alleged symptoms; however, plaintiff's
14 statements concerning the intensity, persistence and limiting
15 effects of the symptoms were not credible to the extent they were
16 inconsistent with the ALJ's RFC assessment (Tr. 20). At step
17 four, the ALJ found that plaintiff is capable of performing her
18 past relevant work as a utility clerk, receptionist, medical
19 assistant, restaurant hostess and informal waitress (Tr. 21).
20 Accordingly, the ALJ concluded, at step four, that plaintiff was
21 not disabled as defined by the Act from November 24, 2008, through
22 the date of his decision, February 1, 2010 (Tr. 22).

23 ISSUES

24 Plaintiff alleges the ALJ erred as follows:

- 25 1. The ALJ erred by rejecting the lay witness evidence
26 without articulating specific reasons germane to the
witness;
- 27 2. The ALJ erred at step two of the sequential evaluation
28 process by failing to assess whether plaintiff's right
hand impairment is "severe";

- (ECF No. 14 at 18-29).

I. Credibility

While plaintiff does not specifically challenge the ALJ's finding that plaintiff is not fully credible in this case, a review of the ALJ's determination in this regard is informative.

The ALJ indicated several reasons why plaintiff was not entirely credible. In addition to record evidence of inconsistencies in plaintiff's presentation and plaintiff's display of abnormal pain behavior, the ALJ noted evidence and concerns of plaintiff's overuse of medications, plaintiff's request for marijuana as a treatment, and plaintiff's subsequent use of marijuana (Tr. 20). Plaintiff's testimony at the administrative hearing was also contrary to the evidence of record: she testified that knee replacement surgery was not offered due to the chance of infection, but the record reflects she had little or no arthritis and no justification for knee replacement surgery; she testified that physical therapy was not prescribed for her back as her doctor did not think it would help, yet she was actually noncompliant with rehabilitation recommendations following her back surgery; and she testified she wears a back brace all day and it interferes with her ability to

1 sit for long periods, but she was directed by her doctor to only
2 wear the back brace at night, not during the day (Tr. 20-21). The
3 ALJ also found plaintiff's trips out of town, a three-week
4 vacation to Mexico in 2008, an out of town trip in June 2009, and
5 a second trip to Mexico in October 2009, were inconsistent with
6 her testimony of significant limitations in her activities of
7 daily living (Tr. 21).

8 The ALJ's determination that plaintiff's statements were not
9 fully credible is well supported by the evidence of record.

10 **B. Lay Witness**

11 Plaintiff contends that the ALJ erred by not making proper
12 credibility findings as to the testimony of plaintiff's daughter,
13 Ms. Tessalynn Daniel. (ECF No. 14 at 18-19).

14 The ALJ shall "consider observations by non-medical sources
15 as to how an impairment affects a claimant's ability to work."
16 *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987), *citing* 20
17 C.F.R. § 404.1513(e)(2). The ALJ may not ignore or improperly
18 reject the probative testimony of a lay witness without giving
19 reasons that are germane to each witness. *Dodrill v. Shalala*, 12
20 F.3d 915, 919 (9th Cir. 1993).

21 Here, the ALJ indicated that Ms. Daniel's statement was
22 carefully considered (Tr. 20). The ALJ indicated that the
23 statement was "not found to be inconsistent" with the ALJ's RFC
24 determination (Tr. 20). A review of Ms. Daniel's statement,
25 however, reveals that it is, in fact, contrary to the ALJ's
26 ultimate RFC determination in this case. While Ms. Daniel
27 indicated that plaintiff could not sit, stand or walk for very
28 long (Tr. 120-127) the ALJ specifically concluded that plaintiff

1 retained the ability to sit 6 hours total and to stand and/or walk
2 6 hours total in an 8-hour day (Tr. 19). The ALJ erred by failing
3 to provide germane reasons for his rejection of Ms. Daniel's
4 statement in this regard.

5 Defendant contends that any alleged error in evaluating the
6 lay witness testimony was harmless.¹ (ECF No. 17 at 14-16).
7 However, should Ms. Daniel's statement regarding plaintiff's
8 functioning be credited, the ALJ's RFC determination would not be
9 consistent with the statement. The ALJ's failure to provide
10 germane reasons for rejecting Ms. Daniel's statement is not
11 harmless error.

12 **II. Severe Impairment**

13 Plaintiff next argues that the ALJ erred at step two of the
14 sequential evaluation process by failing to assess the severity of
15 her right hand impairment. (ECF No. 14 at 19-22).

16 Plaintiff has the burden of proving that she has a severe
17 impairment at step two of the sequential evaluation process. 42
18 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 423(d)(1)(A), 416.912. In
19 order to meet this burden, Plaintiff must furnish medical and
20 other evidence that shows that she has a severe impairment. 20
21 C.F.R. § 416.912(a). The regulations, 20 C.F.R. §§ 404.1520(c),
22 416.920(c), provide that an impairment is severe if it
23 significantly limits one's ability to perform basic work

24
25
26 ¹An ALJ's decision will not be reversed for errors that are
27 harmless. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005)
28 (*citing Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1991)).
An error is harmless when the correction of that error would not
alter the result. *Johnson v. Shalala*, 60 F.3d 1428, 1436 n. 9
(9th Cir. 1995).

1 activities. An impairment is considered non-severe if it "does
2 not significantly limit your physical or mental ability to do
3 basic work activities." 20 C.F.R. §§ 404.1521, 416.921. "Basic
4 work activities" are defined as the abilities and aptitudes
5 necessary to do most jobs. 20 C.F.R. §§ 404.1521(b), 416.921(b).

6 Step two is "a de minimis screening device [used] to dispose
7 of groundless claims." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th
8 Cir. 1996). An ALJ may find that a claimant lacks a medically
9 severe impairment or combination of impairments only when this
10 conclusion is "clearly established by medical evidence." S.S.R.
11 85-28; see, *Webb v. Barnhart*, 433 F.3d 683, 686-687 (9th Cir.
12 2005). Applying the normal standard of review to the requirements
13 of step two, the Court must determine whether the ALJ had
14 substantial evidence to find that the medical evidence clearly
15 established that plaintiff did not have a medically severe
16 impairment. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988);
17 *Webb*, 433 F.3d at 687.

18 Plaintiff testified, and it is uncontested, that her right
19 hand was severed in 1978, and, as a result, she has no feeling in
20 the four fingers of her right hand (Tr. 45-46). However, the ALJ
21 did not find that plaintiff's right hand injury was a medically
22 severe impairment, nor did the ALJ's RFC determination account for
23 limitations stemming from the right hand impairment. In fact,
24 with the exception of a brief mention of prior hand surgery², the
25 ALJ's decision does not discuss plaintiff's right hand impairment

27 ²While analyzing plaintiff's credibility, the ALJ merely
28 mentions that plaintiff "had a total of 13 surgeries over the
years, including one on the right hand" (Tr. 19).

1 (Tr. 19). Of significance, while the ALJ's step four
2 determination found plaintiff capable of performing her past
3 relevant light-exertion level work and her past sedentary-level
4 work as a receptionist (Tr. 21), the vocational expert testified
5 that if plaintiff was unable to use a keyboard, it would create a
6 problem for obtaining a receptionist position (Tr. 69).

7 Plaintiff ultimately bears the burden of establishing a
8 severe impairment. 20 C.F.R. § 404.1512(c) ("You must provide
9 medical evidence showing that you have impairment(s) and how
10 severe it is during the time you say you are disabled"). The Code
11 of Federal Regulations explains:

12 [Y]ou have to prove to us that you are blind or disabled.
13 Therefore, you must bring to our attention everything that
14 shows that you are blind or disabled. This means that you
15 must furnish medical and other evidence that we can use to
16 reach conclusions about your medical impairments(s) and, if
material to the determination of whether you are blind or
disabled, its effect on your ability to work on a sustained
basis. We will consider only impairment(s) you say you have
or about which we receive evidence.

17 20 C.F.R. § 404.1512(a). Although it appears plaintiff's right
18 hand impairment is a condition which may significantly limit her
19 ability to do basic work activities, and thus pass the "de
20 minimis" threshold of step two, plaintiff did not allege
21 disability based on difficulty with her right hand. Nevertheless,
22 it appears that plaintiff has limitations with her right hand, and
23 the ALJ failed to adequately address the impairment in his
24 decision. The Court thus finds that the ALJ erred at step two of
25 the sequential evaluation process by failing to discuss
26 plaintiff's right hand impairment. Accordingly, the matter shall
27 be remanded for a new determination at step two of the sequential
28 evaluation process.

1 **III. Physical Limitations**

2 Plaintiff also contends that the ALJ erred by rejecting the
3 opinion of her treating physician, Antoine Tohmeh, M.D. (ECF No.
4 14 at 22-26). Plaintiff specifically complains that the ALJ
5 erroneously rejected the opinion expressed by Dr. Tohmeh on a
6 December 2009 disabled parking permit application form.

7 On December 10, 2009, Dr. Tohmeh's filled out an application
8 for a disabled parking permit which indicated that plaintiff was
9 temporarily limited, for a period of six months³, and opined that
10 plaintiff was "severely limited to walk due to arthritic,
11 neurological, or orthopedic condition" (Tr. 502).

12 The ALJ determined that Dr. Tohmeh's December 2009 disabled
13 parking permit application form was unsupported by persuasive
14 explanations or clinical findings (Tr. 21). In assessing
15 plaintiff's physical residual functional capacity, the ALJ instead
16 relied upon the opinions of state agency nonexamining physicians
17 (Tr. 21, 377-384, 411).

18 While it is true that Dr. Tohmeh's opinions on the disabled
19 parking application form are not supported by an explanation for
20 the restrictions noted therein, the record is devoid of evidence
21 from a treating or examining medical source regarding plaintiff's
22 ability to walk during the relevant time period. Given Dr.
23 Tohmeh's December 2009 opinion, Ms. Daniel's lay witness statement
24 regarding plaintiff's limitations which, at this juncture, has not
25 been rejected, and the lack of medical evidence of record during
26

27 ³The limitations assessed by Dr. Tohmeh would thus not meet
28 the duration requirements of the Act (one year). 42 U.S.C. §
1382c(a)(3)(A).

1 the relevant time period on the subject, the undersigned finds
 2 that the issue of plaintiff's ability to stand/walk should be
 3 reassessed on remand. On remand, the ALJ shall reconsider Dr.
 4 Tohmeh's opinion stated on the temporary disabled parking permit
 5 application form and, if deemed necessary, contact Dr. Tohmeh to
 6 determine a basis for that opinion.⁴

7 **IV. Step Four Determination**

8 Plaintiff contests the ALJ's step four determination in this
 9 case. (ECF No. 14 at 27-29).

10 A claimant will be found not disabled when it is determined
 11 that she retains the RFC to perform either the actual functional
 12 demands and job duties of a particular past relevant job, or the
 13 functional demands and job duties of the occupation as generally
 14 required by employers throughout the national economy. SSR 82-61.
 15 "If a claimant shows that he or she cannot return to his or her
 16 previous job, the burden of proof shifts to the Secretary to show
 17 that the claimant can do other kinds of work." *Embrey v. Bowen*,
 18 849 F.2d 418, 422 (9th Cir. 1988). Therefore, the burden shifts
 19 to the ALJ to identify specific jobs existing in substantial
 20 numbers in the national economy that plaintiff can perform despite
 21 her identified limitations only after plaintiff has established a
 22 prima facie case of disability by demonstrating she cannot return

23
 24 ⁴In Social Security cases, the ALJ has a special duty to
 25 develop the record fully and fairly and to ensure that the
 26 claimant's interests are considered, even when the claimant is
 27 represented by counsel. *Tonapetyan v. Halter*, 242 F.3d 1144,
 1150 (9th Cir. 2001); *Brown v. Heckler*, 713 F.2d 441, 443 (9th
 28 Cir. 1983). An ALJ's duty to develop the record is triggered
 only when there is ambiguous evidence or when the record is
 inadequate to allow for proper evaluation of the evidence.
Tonapetyan, 242 F.3d at 1150.

1 to her former employment. *Hoffman v. Heckler*, 785 F.2d 1423, 1425
2 (9th Cir. 1986).

3 As determined above, the ALJ erred in this case by failing to
4 provide germane reasons for rejecting Ms. Daniel's statement
5 regarding plaintiff's limitations and by failing to adequately
6 address plaintiff's right hand impairment. *Supra*. Accordingly,
7 this matter must be remanded for additional proceedings.

8 On remand, the ALJ shall specifically address Ms. Daniel's
9 statement and give the statement whatever weight the ALJ finds
10 appropriate. The ALJ shall also address plaintiff's right hand
11 impairment and make a determination regarding that impairment at
12 step two of the sequential evaluation process. As indicated
13 above, the ALJ shall reconsider Dr. Tohmeh's opinion stated on the
14 temporary disabled parking permit application form and, if deemed
15 necessary, contact Dr. Tohmeh to determine a basis for his opinion
16 on that form. Prior to a new administrative hearing, plaintiff
17 shall undergo a consultative physical examination. In addition,
18 the ALJ shall elicit the testimony of a medical expert at the new
19 administrative hearing to assist the ALJ in formulating a new
20 physical residual functional capacity determination. Plaintiff's
21 new RFC assessment should be presented to a vocational expert to
22 determine if plaintiff is capable of performing any of her past
23 relevant work or any other work existing in sufficient numbers in
24 the national economy.

25 CONCLUSION

26 The Court has the discretion to remand the case for
27 additional evidence and finding or to award benefits. *Smolen v.*
28 *Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). The Court may award

1 benefits if the record is fully developed and further
2 administrative proceedings would serve no useful purpose. *Id.*
3 Remand is appropriate when additional administrative proceedings
4 could remedy defects. *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th
5 Cir. 1989). In this case, further development is necessary to
6 remedy defects and for a proper determination to be made.

7 Accordingly, **IT IS ORDERED:**

8 1. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is
9 **GRANTED, IN PART**, and the matter is **REMANDED** to the Commissioner
10 for additional proceedings consistent with this order.

11 2. Defendant's Motion for Summary Judgment (**ECF No. 16**) is
12 **DENIED**.

13 3. Application for attorney fees may be filed by separate
14 motion.

15 The District Court Executive is directed to file this Order
16 and provide a copy to counsel for plaintiff and defendant.

17 **Judgment shall be entered in favor of plaintiff, and the file**
18 **shall be CLOSED.**

19 **DATED** this 16th day of November, 2012.

20
21 S/Fred Van Sickle
22 Fred Van Sickle
23 Senior United States District Judge
24
25
26
27
28